

DEBORA R. HUFF
Claimant
VS.
SELLMAN KENNELS/WICHITA GREYHOUND
PARK
Respondent
AND
NATIONAL UNION FIRE INSURANCE COMPANY
Insurance Carrier
AND
KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD AND STIPULATIONS

Record

Stipulations

- (1) Claimant alleges accidental injury occurring on February 19, 1993. The Workers Compensation Fund, appearing in place of Sellman Kennels, and the claimant agreed claimant's average weekly wage was \$300 per week on the date of the alleged accident. Temporary total disability compensation was paid from February 19, 1993, to March 31, 1995, in the amount of \$200 per week, for a total of \$21,782.
- (2) Claimant elected to proceed against Sellman Kennels rather than against Wichita Greyhound Park, with the Kansas Workers Compensation Fund representing Sellman Kennels and reserving the right to claim, at a later date, a reimbursement against Wichita Greyhound Park as a statutory employer for the claimant.

ISSUES

- (1) What is the nature and extent of claimant's injury and or disability?
- (2) Is the Workers Compensation Fund entitled to a credit for an overpayment of temporary total disability compensation earlier ordered?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant suffered accidental injury on February 19, 1993, when she slipped and fell on ice, landing on her buttocks, with her arms down, causing injury to her back. The employer was notified of the accident on that same date and claimant sought treatment with Minor Emergency Center. Claimant continued working for approximately a week and a half. She was referred for therapy and was told not to return to work until she was 100 percent.

Claimant received medical treatment through the Drake Chiropractic Clinic through March 17, 1993. She was suffering pain in her neck, shoulders, down her arms and into her lower back.

On May 25, 1993, claimant requested, at preliminary hearing, the authorization of Dr. Michael W. Treweeke. At the end of the preliminary hearing, the Administrative Law Judge granted claimant's request and authorized Dr. Treweeke as the treating physician, and further granted claimant \$200 a week temporary total disability compensation until released. At preliminary hearing, claimant first stated she started missing work on approximately March 4, 1993. Claimant later testified her last day of work was February 28, 1993. She was awarded temporary total disability commencing February 28, 1993.

Dr. Treweeke, who is board certified in internal medicine, first saw claimant on March 29, 1993, and was provided a history of injury consistent with claimant's testimony. Claimant was suffering pain in her shoulders, upper back, left hip, low back, right elbow and left forearm. Dr. Treweeke diagnosed claimant with musculoskeletal injuries, including strained muscles. He saw her again on April 1, 1993, after claimant had x-rays taken on March 30, 1993. The x-rays were of the cervical spine, thoracic spine, right shoulder, pelvis and left hip. He noted a straightening of claimant's cervical spine which could either be due to muscle strain and spasm or heredity. Her thoracic spine showed a dextroscoliosis which, along with the cervical spinal levoscoliosis, he took to be a preexisting condition. The x-rays to the right shoulder, pelvis and left hip were all normal. An MRI done April 2, 1993, confirmed the straightening of the cervical spine. Claimant was referred for physical therapy and work hardening. Dr. Treweeke next saw her on September 22, 1993, after her discharge from work hardening on September 13, 1993. He felt at that time she had reached maximum medical improvement. Even though claimant had been discharged from work hardening, she continued to complain of persistent aches in her upper chest, numbness in the left arm and two fingers, persistent headaches, difficulty in looking over her left shoulder and a propensity to drop things. He opined claimant seemed to hurt all over, and could not explain her ongoing and persistent complaints. He began to believe that they were dealing with a workers compensation problem.

Dr. Treweeke testified, after seeing the extent of claimant's injuries suffered in February 1993, that he would have anticipated that she would improve within a week or two after the injury. When he saw her in March and she was continuing to have the same problems, he was suspicious. He began to seriously doubt the validity of her complaints in the summer of 1993. He referred her for work hardening, feeling it was the best way to return her to work.

He referred her to Dr. Mullinex for her ongoing headaches because she had been referred to Dr. Mullinex for the headaches prior to the fall in February 1993. Dr. Treweeke last saw claimant January 13, 1994, at which point she was continuing to have discomfort in the upper body. He felt at that time she was at a standstill.

Dr. Treweeke again reviewed the MRI and x-rays, and opined there was nothing there to indicate a permanent problem resulting from the February 19, 1993, fall. Claimant

had no neurological symptoms, but continued to have headaches. He went on to find no permanent disability, no permanent functional impairment and opined claimant needed no work restrictions. His final diagnosis indicated musculoskeletal aches and pains around the neck, both shoulders and upper chest. Other than the straightening of the cervical spine on x-ray, he had no objective findings to explain her ongoing symptoms.

He did note that the physical therapy notes from Karen Moore with Rehabilitation Associates of Kansas showed a possible facet impingement at T3-T4, but he indicated there was no way for him to comment on what was meant by the facet impingement. The physical therapy notes also showed cervical muscle spasms and muscle tightness in other areas of claimant's body. The August 1993 physical therapy notes indicated a marked increase in muscle tone in the head, neck and upper back, with several identifiable trigger points. When he last saw claimant in January 1994, she was still reporting persistent symptoms.

Claimant was referred to board certified orthopedic surgeon Dr. Robert A. Rawcliffe, Jr., by the Fund attorney. Dr. Rawcliffe had the opportunity to review x-rays from Drake Chiropractic Clinic supporting a finding of a cervical hypolordosis or loss of normal cervical lordotic curve. He noted claimant went through extensive physical therapy and work hardening, but was not provided a report from the functional capacity evaluation.

Claimant's complaints were consistent in that they were in her upper back, neck, lower back and legs, and right shoulder into the right hand. Dr. Rawcliffe noted claimant had received a great deal of treatment for her physical symptoms but had not responded to the treatment regimen. He felt she needed no additional treatment, finding no permanent impairment or any permanent restrictions as a result of the fall on February 19, 1993. He did feel her prolonged inactivity and the weight that she had gained would result in some weakness of the supporting muscles in her spine and predispose her to back problems if she did any heavy lifting. He recommended she undergo some rehabilitation and lose weight before she returned to work. Dr. Rawcliffe did not believe the claimant's muscle loss was related to the accident.

Claimant was referred by Mr. Slape, her attorney, to Dr. Lawrence Blaty. Dr. Blaty is board certified in physical medicine and rehabilitation. Dr. Blaty was asked to assess claimant's chronic cervical, thoracic and lumbar pain with tension headaches. He assessed claimant a 10 percent whole body functional impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, and 12 percent to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). Claimant was restricted from lifting 20 pounds occasionally for overhead use, and 45 pounds occasionally for level lift. Claimant could lift 30 pounds frequently for normal use. He recommends she limit herself to occasional bending, stooping or climbing activities, and no more than frequent overhead activities. Any overhead lifting would be limited to no more than 20 pounds occasionally or 10 pounds

frequently, and she should avoid prolonged sitting for greater than one hour at a time, with the opportunity to periodically change positions.

Dr. Blaty acknowledged there were no objective findings of injury but claimant did have tender points which he described as being somewhat objective. He diagnosed soft tissue injuries, and admitted there were no tests to verify these types of problems. He examined claimant on only one occasion, and the findings were for the most part subjective in nature. Based upon objective findings, claimant would have no functional impairment to the body as a whole.

Claimant was referred by respondent to Karen Terrill, vocational rehabilitation specialist, for an assessment of her loss of access to the open labor market and loss of ability to earn a comparable wage. Ms. Terrill opined, in considering the opinions of Dr. Rawcliffe and Dr. Treweeke, that claimant suffered no loss of access to the open labor market and no loss of ability to earn a comparable wage. When considering the report of Dr. Blaty, she felt claimant had suffered no loss of ability to earn a comparable wage, but a 24 percent loss of access to the open labor market.

Claimant was also referred to Francine Knight, by her attorney, for a vocational assessment. Ms. Knight considered the reports of Dr. Blaty and Dr. Michael Estivo in finding claimant had suffered a 77 percent loss of access to the open labor market and a 34 percent loss of ability to earn a comparable wage. The Administrative Law Judge found the report of Ms. Knight, based upon the medical opinions of Dr. Blaty and Dr. Estivo, to be the most persuasive, and awarded claimant a 55.5 percent work disability.

Conclusions of Law

In proceedings under the Workers Compensation Act, it is the claimant's burden of proof to establish her right to an award of compensation by proving the various conditions upon which her right depends, by a preponderance of the credible evidence. See K.S.A. 1990 Supp. 44-501 and K.S.A. 1991 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by the medical evidence presented, and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The Appeals Board finds, after reviewing the medical evidence and the testimony of claimant that the medical opinion of Dr. Blaty is the most persuasive and credible evidence in the record. Dr. Blaty assessed claimant with chronic cervical, thoracic and lumbar pain with tension headaches, and provided specific limitations and restrictions upon her ability to lift, bend, stoop, climb and participate in overhead activities. He also advised

claimant avoid prolonged sitting for periods greater than one hour, and requested claimant be given the opportunity to change positions periodically. Dr. Blaty assessed claimant a 10 percent whole body functional impairment under the AMA Guides, Fourth Edition, and a 12 percent functional impairment under the AMA Guides, Third Edition (Revised). As claimant's date of accident is February 19, 1993, the Third Edition is, per statute, the required version to be utilized, and claimant is found to have suffered a 12 percent functional impairment to the body as a whole as a result of the injuries suffered on February 19, 1993.

In adopting the opinion of Dr. Blaty, the Appeals Board also adopts the opinions of Ms. Knight and Ms. Terrill as appropriate. Considering the opinions of both Ms. Terrill and Ms. Knight, as they relate to the restrictions recommended by Dr. Blaty, the Appeals Board finds claimant has suffered a 50.5 percent loss of access to the open labor market and a 17 percent loss of ability to earn comparable wages, resulting in a 33.75 percent permanent partial disability to the body as a whole.

The Administrative Law Judge found that, by court order of May 25, 1993, the Fund was required to pay temporary total disability compensation to claimant in the sum of \$200 per week commencing February 28, 1993. As the Fund paid claimant through March 31, 1995, this represented a total payment of \$21,782 in temporary total disability benefits. Dr. Treweeke testified that claimant had reached maximum medical improvement at the end of her work hardening program on September 13, 1993. This represents an overpayment of \$16,114 in temporary total disability benefits, and the Fund is granted a credit for this amount in the Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 20, 1998, should be, and is hereby, modified, and the claimant, Debora R. Huff, is granted an award against the respondent, Sellman Kennels, and the Kansas Workers Compensation Fund for an accidental injury occurring on February 19, 1993, and based upon an average weekly wage of \$300 per week.

Claimant is entitled to 28.34 weeks of temporary total disability compensation at the rate of \$200.01 per week totaling \$5,668, followed by 386.66 weeks permanent partial disability compensation at the rate of \$67.50 per week totaling \$26,099.55, for a total award of \$31,767.55.

As of October 5, 1998, claimant is entitled to 28.34 weeks temporary total disability compensation at the rate of \$200.01 per week totaling \$5,668, followed by 265.09 weeks permanent partial disability compensation at the rate of \$67.50 per week totaling \$17,893.58 for a total due and owing of \$23,561.58, all of which is ordered paid in one

lump sum, minus amounts previously paid. Thereafter, the remaining balance in the amount of \$8,205.97 shall be paid at the rate of \$67.50 per week for 121.57 weeks, until fully paid or until further order of the Director.

The Workers Compensation Fund is granted a credit in the amount of \$16,114 representing the overpayment of temporary total disability compensation, paid at the rate of \$200 per week for 80.57 weeks, which amount shall be deducted from the payments due and owing claimant, with the deduction occurring at the end of the Award payment schedule.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical benefits may be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's contract for attorneys fees is approved subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the Fund to be paid as follows:

Deposition Services

Transcript of regular hearing	\$ 233.50
Deposition of Donald Hess	187.80
Deposition of Michael W. Treweeke, M.D.	275.80
Deposition of Robert A. Rawcliffe, Jr., M.D.	238.50
Deposition of Karen Crist Terrill	153.00
Transcript of preliminary hearing	Unknown

Ireland Court Reporting

Deposition of Motion	\$ 49.00
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Barber & Associates

Deposition of Francine Knight	\$ 296.00
Deposition of Lawrence R. Blaty, M.D.	158.40

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority. In adopting the opinion of Dr. Blaty, the majority has rejected the opinion of Dr. Treweeke, the authorized treating physician. It is significant that claimant took this matter to preliminary hearing in 1993 in order to have Dr. Treweeke named as her authorized treating physician. Dr. Treweeke had the opportunity to examine and treat claimant over a period of nearly ten months. During this period of time, Dr. Treweeke began to develop significant concerns about the legitimacy of claimant's complaints. With the exception of a reversed lordotic curve in claimant's cervical spine, all of the tests performed on claimant were found to be normal. With no objective findings, the only basis for which a functional impairment could be given was claimant's subjective complaints, unverifiable by tests. Even Dr. Blaty, claimant's chosen physician, acknowledged that claimant would have no functional impairment when considering objective findings. Only claimant's ongoing and unexplainable complaints justified any type of functional award.

Both Dr. Treweeke and Dr. Robert A. Rawcliffe, Jr., a board certified orthopedic surgeon, opined claimant had no functional impairment and no need for any work restrictions. This supports no loss in claimant's ability to perform work in the open labor market and no loss in claimant's ability to earn a comparable wage.

Only when considering the biased opinion of Dr. Blaty can a functional impairment and work disability be assessed. This member of the Appeals Board would find that the greater weight of the credible evidence, as required by K.S.A. 44-501, would be with Dr. Treweeke, the treating physician.

In considering the totality of the evidence, this Appeals Board member would find that claimant has failed to prove any permanency associated with the injury occurring on February 19, 1993, and would award claimant temporary total disability compensation through September 13, 1993, and claimant's authorized and unauthorized medical treatment to the date of the Award, but would deny claimant any permanent functional impairment or any permanent work disability from this injury.

BOARD MEMBER

c: Gary E. Patterson, Wichita, KS
Steven L. Foulston, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director